Johar bin Mustapha v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–56 OF 2003
GOPAL SRI RAM, AHMAD MAAROP AND SULAIMAN DAUD JJCA
13 MAY 2008

Criminal Law — Dangerous Drugs Act 1952 — s 39B(1) — Trafficking — Appeal against conviction and death sentence — Whether trial judge misdirected himself in arriving at his decision of accused's demeanor — Whether accused merely had possession and not trafficking in drug — Dangerous Drugs Act 1952 s 39B(1)

Criminal Procedure — Prosecution — Witnesses — Evidence of accused — Flight from scene — Testimonies of prosecution's witnesses conflicting, equivocal and wanting in credibility — Whether evidence credible and admissible

This was the accused's appeal against his conviction and death sentence for the offence of drug trafficking under s 39B(1) of the Dangerous Drugs Act 1952 ('the Act'). The accused submitted that the learned judge had misdirected himself in finding that the accused knew the bag contained the proscribed drug in question. The learned judge in arriving at his conclusion that the accused had mens rea possession of the drug had relied on the circumstances, inter alia, that the accused had opened the trunk of his car, removed the bag ('exh P6B') and thrown it away; and had ran away upon seeing the police. Counsel for the accused also questioned the trial judge's evaluation of the prosecution's witnesses and submitted that the evidence of the testimonies were conflicting, equivocal and wanting in credibility. The issue for determination were: (i) whether the trial judge had misdirected himself in arriving at his decision of the accused's demeanor based on the circumstantial evidence available; and (ii) whether the accused had mere possession or trafficking in the said drugs.

Held, dismissing the appeal:

(1) The trial judge had made the correct direction of himself. So far as the analysis of the circumstantial evidence was concerned the court could not detect any error. The first of these was the appearance of the accused

A when approached by PW5 and his friends ('the prosecutor's witnesses'). It was settled that the demeanor of an accused when confronted by the police which was relevant and admissible under s 8 of the Evidence Act 1950. Therefore the accused's complaint about the use to which the learned judge put this evidence to be without merit (see paras 5–6); *Om Prakash Bakshi v State* [1989] Cr LJ 1207 referred.

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(2) Secondly, the fact that the accused took flight upon seeing the police. In this case, there were other pieces of evidence which must be considered together with evidence of the accused's flight from the scene. When thus treated, the accused's conduct lends weight to the inference that he knew that the bag contained the proscribed drug in question (see para 7).

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(3) On the issue of credibility of the trial judge's assessment and evaluation of the evidence of the several witnesses, the court was unable to detect any appealable error or misdirection on his part (see paras 8–9); *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 referred.

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(4) The court was unable to agree with the accused's argument that he merely had possession of the proscribed drug and was not guilty of trafficking in it as evidence showed that the accused was at the material time traveling from the direction of Segamat to Yong Peng with exh P6B in the trunk of his car. Thus, he was conveying the proscribed drug from one place to another. His evidence that exh P6B was never in his car was contradicted by PW5 whose evidence was accepted by the learned judge. Hence, the accused was not in mere passive possession but was committing an overt act in conveying or transporting the drug in question. Therefore, he was trafficking in the said drug (see para 10).

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[Bahasa Malaysia summary

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Ini adalah rayuan tertuduh terhadap sabitan dan hukuman matinya kerana kesalahan mengedar dadah di bawah s 39B(1) Akta Dadah Berbhaya 1952 ('Akta'). Tertuduh berhujah bahawa hakim yang bijaksana telah salah arah dalam penemuannya yang tertuduh mengetahui beg tersebut mengandungi dadah berbahaya yang dipersoalkan. Hakim yang bijaksana semasa tiba kepada kesimpulannya yang tertuduh mempunyai mens rea milikan dadah tersebut telah bergantung kepada keadaan, antara lain, di mana tertuduh telah membuka but keretanya, mengalihkan beg tersebut ('eksh P6B') dan membuangnya; dan telah melarikan diri apabila melihat polis. Peguam bagi pihak tertuduh juga mempersoalkan penilaian hakim perbicaraan tentang saksi-saksi pihak pendakwaaan dan menghujahkan bahawa keterangan testimoni-testimoni adalah bercanggah, menimbulkan keraguan dan tidak boleh dipercayai. Isu yang perlu ditentukan adalah: (i) sama ada hakim perbicaraan salah arah untuk tiba kepada keputusannya tentang perilaku

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tertuduh berdasarkan keterangan mengikut keadaan yang sedia ada; dan (ii) sama ada tertuduh hanya mempunyai milikan atau mengedar dadah tersebut. A

Diputuskan, menolak rayuan: B

(1) Hakim perbicaraan telah mengarahkan dirinya dengan betul. Setakat analisis keterangan mengikut keadaan adalah berkaitan mahkamah tidak menemui apa-apa kesilapan. Pertamanya adalah wajah tertuduh apabila dihampiri oleh polis yang relevan dan diterima di bawah s 8 Akta Keterangan 1950. Oleh itu aduan tertuduh tentang penggunaan keterangan ini oleh hakim yang bijaksana adalah tanpa merit (lihat perenggan 5–6); *Om Prakash Bakshi v State* [1989] Cr LJ 1207 dirujuk. C

(2) Keduanya, fakta yang mana tertuduh telah melarikan diri apabila melihat polis. Dalam kes ini, terdapat keterangan lain yang perlu diambilkira bersama dengan keterangan tertuduh melarikan diri dari tempat kejadian. Jika dinilai, perilaku tertuduh memberikan beban untuk membuat inferens bahawa dia mengetahui yang beg tersebut mengandungi dadah berbahaya yang dipersoalkan (lihat perenggan 7). D

(3) Berhubung isu kebolehpercayaan penilaian dan penelitian hakim perbicaraan tentang keterangan beberapa saksi, mahkamah tidak dapat menjumpai apa-apa kesilapan yang boleh dirayu atau salah arah di pihaknya (lihat perenggan 8–9); *Andy bin Bagindah v Public Prosecutor* [2000] 3 MLJ 644 dirujuk. E

(4) Mahkamah tidak bersetuju dengan hujah tertuduh bahawa dia hanya mempunyai milikan dadah berbahaya tersebut dan tidak bersalah mengedarnya sepertimana yang ditunjukkan oleh keterangan yang tertuduh pada masa material sedang dalam perjalanan dari arah Segamat ke Yong Peng dengan eksh P6B dalam but keretanya. Oleh itu, dia sedang menghantar dadah berbahaya tersebut dari satu tempat ke satu tempat lain. Keterangannya yang eksh P6B tidak pernah berada dalam keretanya adalah bercanggah dengan PW5 yang mana keterangannya telah diterima oleh hakim yang bijaksana. Justeru itu, tertuduh bukan sahaja memiliki secara pasif tetapi melakukan tindakan yang terang-terangan membawa atau menghantar dadah yang dipersoalkan. Oleh itu, dia telah mengedar dadah tersebut (lihat perenggan 10).] F G H

Notes I

For cases on s 39B(1) of the Dangerous Drugs Act 1952, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 308–319.

For cases on witnesses of prosecution, see 5(2) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2997–3000.

Cases referred to

Andy bin Bagindah v PP [2000] 3 MLJ 644 (refd)
Chan Chwen Kong v PP [1962] MLJ 307 (refd)
Om Prakash Bakshi v State [1989] Cr LJ 1207 (refd)

Legislation referred to

Dangerous Drugs Act 1952 s 39B(1)
Evidence Act 1950 s 8

Appeal from: Criminal Trial No 45–21 of 2000 (High Court, Muar)

Kamarul Hisham (Ahmad Zaidi Zainal with him) (The Chambers of Kamarul Hisham & Hasnal Rezua and Ahmad Zaidi & Partner) for the appellant.
Nurulhuda Nur'aini bt Mohd Noor (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] On 2 May 1999 at about 9pm, PW5 was seated at a food stall at Cha'ah located at the 132.5km along the Johor Bahru-Segamat Road. He was with his friends. At about that time he noticed a white car coming from the direction of Segamat towards Yong Peng go off the road while avoiding another vehicle. This happened across the road from where he was seated. He saw a man later identified as the accused (the appellant before us) emerge from the car. PW5 and his friends went towards the accused. They wanted to help him. They were concerned to see if he was alright. But the accused acted rather strangely. He shooed them away. They then returned to the food stall. PW5 saw the accused open the trunk of the car, remove a blue bag and throw it away. He became suspicious and telephoned the police. While making the phone call, PW5 observed the accused standing alone near the car. About half an hour later, a tow truck arrived at the scene but then moved away. Shortly after that the police arrived in a Land Rover. On seeing them the accused began to run away. He was apprehended. PW5 then assisted PW6 (Corporal Rosli Hamid) who was among the police personnel who had arrived at the scene. He narrated to PW6 what he had witnessed and pointed in the direction in which the bag had been flung. The bag was then recovered. It was produced as exh P6B at the trial. PW6 opened the bag. From within it was recovered a substance which upon subsequent chemical analysis was found to be 19,152g of cannabis. The accused was later charged with the offence of trafficking under s 39B(1) of the Dangerous Drugs Act 1952 ('the Act'). He was convicted and sentenced to death. He has now appealed to us.

[3] The main thrust of the accused's submissions is that the learned judge misdirected himself in finding that the accused knew that exh P6B contained the proscribed drug in question, that is to say, that the accused had 'mens rea possession' of the drug. Our attention was drawn to the following individual circumstances upon which the learned judge relied in arriving at his conclusion on this part of the case. First, that the accused had opened the trunk of the car, removed exh P6B and thrown it away. Second, that he had chased away PW5 and those with him who had come forward to help. Third, that the accused look nonplussed when approached by PW5 and his friends. Fourth, that he had run away upon seeing the police. Learned counsel for the accused took us through a minute examination of the conflicting testimonies of the prosecution's witnesses on each of these elements. He submitted that the evidence of the witnesses concerned was at best equivocal and certainly wanting in credibility. The learned judge was criticised by learned counsel for the former's evaluation of the testimony of these witnesses.

[4] Now, it is true that when each circumstance set out earlier is examined individually it does not establish mens rea possession. But the essence of circumstantial evidence is not the strength of each individual strand of evidence. It is the combined effect of all the relevant circumstances when taken together that matters. As Thomson CJ said in *Chan Chwen Kong v Public Prosecutor* [1962] MLJ 307:

> That evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the conviction. That is very true. It must however be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to form a rope. The real question is: is that rope strong enough to hang the prisoner?

[5] In his written judgment the learned judge painstakingly analysed the several individual circumstances and considered them together. He asked himself the right question as follows:

> The obvious question is whether the accused were aware that he was driving a car with a package containing cannabis in the boot. Obviously, the accused must be consciously moving drugs from one place to another, if he were aware that he was driving a car with a package containing drugs in the boot.

This is a correct direction of himself. So far as the analysis of the circumstantial evidence is concerned we can detect no error. However, for the purpose of demonstrating that the learned judge's judgment does not contain any misdirection on this part of the case we will discuss two particular circumstances upon which learned counsel placed much emphasis when making complaint about the way in which the learned judge dealt with them.

A **[6]** The first of these is the appearance of the accused when approached by PW5 and his friends. It is settled that the demeanor of an accused when confronted by the police is relevant and admissible under s 8 of the Evidence Act 1950. An illustrative case is *Om Prakash Bakshi v State* [1989] Cr LJ 1207. In that case, some policemen were on their beat when they saw the B petitioner and his co-accused arguing about a book. Each was snatching it from the other. When confronted by the police they became nonplussed. This fact was taken into account by the High Court when dismissing the accused's petition to revise the sessions court's decision in the following terms:

C > both the accused were in possession of the book containing the morphine and both were nonplussed when confronted by the police. So, from this circumstances a prima facie view can be taken that both the co-accused were having the knowledge that the book contained the morphine.

D We therefore find the accused's complaint about the use to which the learned judge put this evidence to be without merit.

[7] We now turn to the second item of evidence. This has to do with the fact that the accused took flight upon seeing the police. We are aware of the E several authorities which state the proposition that mere flight by an accused is not evidence of his or her guilt. But if you examine the cases in which this has been said you will find that flight was the only circumstance under discussion. But that is not the case here. In the present instance there are other pieces of evidence which must be considered together with evidence of F the accused's flight from the scene. When thus treated, the accused's conduct lends weight to the inference that he knew that exh P6B contained the proscribed drug in question.

G **[8]** The other line of attack mounted by the accused in this appeal is, as we have already said, the way in which the learned judge assessed or evaluated the evidence of the several witnesses. Now the issue of credibility is one of fact for the trier of fact to determine. As Shaik Daud JCA said when delivering the judgment of this court in *Andy bin Bagindah v Public Prosecutor* [2000] 3 H MLJ 644, at p 647:

> There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was I the one who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings.

[9] We have scrutinised with great care the totality of the evidence presented before the learned judge and his treatment and analysis of it. Having done so we are unable to detect any appealable error or misdirection on his part. On the contrary, the learned judge has admirably discussed the facts and the irresistible inferences that fell to be drawn from the primary facts.

[10] There is one final point which we must address. It was suggested by learned counsel for the accused during argument that at best his client merely had had possession of the proscribed drug and was not guilty of trafficking in it. With respect we are unable to agree. There is a vital piece of evidence considered by the learned judge to which we must now advert that demolishes the accused's argument. It is this. The accused was at the material time traveling from the direction of Segamat to Yong Peng with exh P6B in the trunk of his car. Put differently, he was conveying the proscribed drug from one place to another. His evidence that exh P6B was never in his car was contradicted by PW5 whose evidence was accepted by the learned judge. Hence, the accused was not in mere passive possession but was committing an overt act in conveying or transporting the drug in question. He was therefore trafficking in the said drug.

[11] For the reasons already given, we find this appeal to be without merit. It is dismissed. The conviction and sentence passed by the High Court are affirmed.

Appeal dismissed.

Reported by Ezatul Zuria Azhari